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CASE NO. 83-2033

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LIBERTARIAN PARTY OF FLORIDA, an unincorporated association; ALAN TURIN; WILLIAM MARINA, DOUG RAMSAY; and ED CLARK;

Petitioners,

vs.

STATE OF FLORIDA; GEORGE FIRESTONE, as Secretary of State and Chief Election Officer of the State of Florida; BETTY CARTER, as Supervisor of Elections of Orange County; JANE CARROLL, as Supervisor of Elections of Broward County; and DAVID LEAHY, as Supervisor of Elections of Dade County;

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENTS STATE OF FLORIDA, GEORGE FIRESTONE, BETTY CARTER AND JANE CARROLL'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED FOR REVIEW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR DENYING THE PETITION	10
QUESTION I	10
QUESTION II	24
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page(s)
American Party of Texas v. White, 415 U.S. 767 (1974)	14, 17
Anderson v. Celebrezze, 103 S.Ct. 1564 (1983)	22
Aruntunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982), cert. denied 103 S.Ct. 1892 (1983)	19, 25
Beller v. Kirk, 328 F. Supp. 485 (S.D. Fla. 1970), aff'd sub nom. Beller v. Askew, 403 U.S. 925 (1971)	26
Bullock v. Carter, 405 U.S. 134 (1972)	14
Clements v. Fashing, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982)	14, 17
Dart v. Brown, 531 F. Supp. 1002 (E.D. Mich. 1976), aff'd sub nom. Allen v. Austin, 430 U.S. 924 (1977)	18, 25, 26
Hudler v. Austin, 419 F. Supp. 1002 (E.D. Mich. 1976), aff'd sub nom. Allen v. Austin, 430 U.S. 924 (1977)	18
Jenness v. Fortson, 403 U.S. 431 (1971)	14

TABLE OF AUTHORITIES (Cont'd)

Cases	Page(s)
Kirk v. Smathers, Case No. TCA 78-815 (N.D. Fla. 1978)	21, 27
Libertarian Party of Florida v. State, 710 F.2d 790 (11th Cir. 1983)	6
MacBride v. Askew, 541 F.2d 465 (5th Cir. 1976)	26
McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980)	25, 26
Storer v. Brown, 415 U.S. 724 (1974)	18, 21, 28
Williams v. Rhodes, 393 U.S. 23 (1967)	17, 22
Wilson v. Firestone, Case No. TCA 80-880 (N.D. Fla. 1980), aff'd 623 F.2d 345 (5th Cir. 1980)	27
Constitutions	
First Amend., U.S. Const.	2
Fourteenth Amend., U.S. Const.	2
Rules	
Rule 17, Rules of U.S. Sup. Ct.	24
Rule 17.1(a), Rules of U.S. Sup. Ct.	24

TABLE OF AUTHORITIES (Cont'd)

Statutes

Chs. 97-106, Fla. Stat.	2
Sec. 97.021(14), Fla. Stat.	3
Sec. 99.0955, Fla. Stat.	3
Sec. 99.096, Fla. Stat.	3, 19
Sec. 103.021, Fla. Stat.	4

QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Eleventh Circuit departed from the essential requirements of law; specifically:

A. Whether the Circuit Court correctly applied the "strict scrutiny" standard of review by recognizing the compelling interests of the State of Florida and balancing those interests against the means used by the State to regulate ballot access for minor political parties, as defined in the Florida Election Code.

B. Whether the Circuit Court correctly concluded that, in its totality, Florida's system of ballot access for minor political parties constitutes the least drastic method for effectively protecting the State's compelling interests.

C. Whether the Circuit Court committed any reversible error.

II. Whether any conflict exists between the Circuit Court's decision and any decision of the United States Supreme Court or of any other circuit court, or whether the Petitioners have merely reargued their case made to the District and Circuit Courts below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioners based their case in the District Court below upon the First and Fourteenth Amendments to the United States Constitution. In doing so, the Petitioners posited a laundry list of statutes adopted by the Florida Legislature, appearing as part of Chapters 97 through 106, Florida Statutes, the Florida Election Code. The only statutes which the Petitioners have

properly presented to this Court for possible review are the following:

1. Section 99.096, Florida Statutes, establishing a three percent (3%) petitioning requirement for minor parties, as defined, to gain ballot access in the State of Florida.

2. Section 97.021(14), Florida Statutes, defining a "minor party".

3. Section 99.0955, Florida Statutes, providing ballot access for independent candidates by obtaining signatures of three percent (3%) of the electors eligible to vote on the race in which the independent candidate wishes to run.

As to the remaining statutes which the Petitioners continue to list here, they have not presented any argument to this Court which would establish any basis for review. The Petitioners proceeded in similar fashion in the District and Circuit

Courts below. Both Courts summarily disposed of this laundry listing of the statutes due to the lack of evidence and argument presented by the Petitioners. See pages 30 and 61 of the Petitioners' Appendix.

Particular note should be made of Section 103.021, Florida Statutes, establishing a one percent (1%) petition requirement for minor political party presidential candidates. Although the Petitioners have cited to it (see page 11 of the Petition), the balance of the Petition contains no argument whatsoever on the statute. More significantly, the Petition has not raised any issue concerning the dismissal of Ed Clark, the only Petitioner arguably with standing to raise the question concerning Section 103.021. The District Court dismissed Mr. Clark, which dismissal was affirmed by the

Circuit Court. The instant Petition has not even mentioned Mr. Clark's dismissal.

STATEMENT OF THE CASE

The Respondents State of Florida, George Firestone, Betty Carter and Jane Carroll offer the following statement of the case in order to correct and supplement erroneous statements made by the Petitioners.

The Petitioners brought suit in the United States District Court for the Middle District of Florida. The unreported decision of that Court is included in the Appendix to the Petition and speaks for itself. The District Court dismissed the Plaintiff Ed Clark for lack of standing, finding that he did not reside in Florida, did not intend to run as a presidential candidate, and had no other interest necessary to give him standing in the case.

The Petitioners have merely reargued here what was argued in the Courts below, including the laundry list of statutes (see pages 10 through 15 of the Petition). Both Courts found not only that the Petitioners failed to present any evidence concerning all these statutes but also simply misread or misrepresented the contents of those statutes.

The Petitioners have inaccurately summarized the evidence below. It should first be noted that the Petitioners have not included any part of the evidentiary record in their Appendix. The findings made by the Circuit Court below concerning the evidence therefore are unrefuted. The Circuit Court noted that the American Party had twice qualified a slate of candidates by utilizing the three percent (3%) petitioning method. Libertarian Party of Florida v. State, 710 F.2d 790, 795 (11th

Cir. 1983). Contrary to the Petitioners' claims that it was virtually impossible for them to meet the three percent (3%) petitioning requirement, the evidence clearly established that they failed to make any effort whatsoever to attempt to meet it. Id. As they did in the lower courts, the Petitioners seem to force a comparison between the Florida Election Code and election statutes in other states. Many of the Petitioners' contentions are nothing more than restatements of the contents of the statutes of Florida (for example, requiring a three percent (3%) petition for every election, in the absence of obtaining permanent ballot access by five percent (5%) registration). The statement on page 16 of the Petition that Florida does not permit obtaining a large portion in one

geographical locality is totally inaccurate. As the Circuit Court noted:

> "There are no geographical limitations on the number of signatures which can be gathered from a certain area. A party can thus concentrate its petition efforts in populated areas."

710 F.2d at 794.

The opinion of the Circuit Court reflects conclusions far different than the Petitioners' representation to this Court concerning the testimony offered by the state and the local Supervisor of Elections Betty Carter concerning the compelling interest involved. That opinion reflects the Petitioners' concession that the State has an interest in regulating the election process and avoiding voter confusion. 710 F.2d at 793. The Circuit Court went to some length in its opinion to reflect the "totality" of Florida's three percent (3%) petitioning system, expressly noting those

parts of the statute that "ease a party's ability to obtain signatures". 710 F.2d at 794.

The Circuit Court responded directly to the comparison of the independent candidate versus the minor political party slate of candidates. Beginning at page 795 of the opinion, the Circuit Court affirmed the District Court's recognition of the qualitative difference between an independent candidacy and a party candidacy.

The Circuit Court rendered its opinion on July 29, 1983. Petitioners timely filed a Motion for Rehearing which was denied on March 12, 1984. In addition to those matters previously mentioned in the Statement of the Case, the Circuit Court affirmed the District Court's dismissal of Ed Clark for lack of standing. The Circuit Court also denied the Motion to Dismiss the

Petitioner Alan Turin made on the ground that he had since qualified and run for office as an independent rather than as a Libertarian candidate.

REASONS FOR DENYING THE PETITION

QUESTION I.

THE CIRCUIT COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW. THE COURT CORRECTLY APPLIED THE "STRICT SCRUTINY" STANDARD OF REVIEW IN CONCLUDING THAT THE STATE OF FLORIDA HAD COMPELLING INTERESTS IN REGULATING ITS ELECTIONS AND HAD, CONSIDERING ALL APPLICABLE PROVISIONS, ADOPTED THE LEAST DRASTIC MEANS FOR PROTECTING THOSE INTERESTS.

The Circuit Court noted early in its opinion affirming the District Court that it was "applying what appears to be rather settled law" (emphasis added). 710 F.2d at 792. The Respondents submit that the Circuit Court was eminently correct. The Circuit Court correctly applied numerous decisions of this Court. In doing so, the

Circuit Court did not depart from the essential requirements of law and committed no error.

The Petitioners continue to insist that the District Court and the Circuit Court were ignorant of the "strict scrutiny" test, or, if aware of it, they refused to apply it. The Petitioners use the phrase repeatedly but never offer any logic or explanation as to their meaning when they espouse the "strict scrutiny" test.

The Circuit Court's opinion clearly contradicts the Petitioners' claim that the Circuit Court ignored the test. In fact, the Circuit Court expressly recognized this as the very issue which the Petitioners desired to raise. The Circuit Court acknowledged the Petitioners' contention that "the District Court erred in applying an incorrect level of scrutiny to appraise the challenged statutes". 710 F.2d at

792. From this point, the Circuit Court analyzed the "strict scrutiny" standard in a very well-reasoned and logical fashion, acknowledging and applying numerous cases germane to the issues.

The Respondents do not dispute that this case arises in the context of fundamental constitutional rights; namely, the right to vote and the right to associate. The Respondents have never disputed that the proper analysis of the case required the determination of the State's compelling interest in regulating its elections with a subsequent analysis of the means adopted by the State to protect its interests, balanced against the effect on the fundamental rights involved.

There can be little dispute that Florida's interests in regulating its elections constitute compelling

interests. As the Circuit Court stated at page 793 of its opinion:

> "That these, and the other interests asserted, are compelling has been well established under decided cases."

The interests indicated to the Circuit Court by the record in this case were added to the following compelling state interests which have been recognized by this Court: (1) avoiding voter confusion, (2) avoiding deception, (3) avoiding frustration of the democratic process at the general election, (4) preventing the clogging of the State's election machinery, (5) assuring that the general election winner is the choice of the majority, or at least a strong plurality, of those voting, (6) avoiding the expense and burden of runoff elections, (7) avoiding overcrowded ballots, (8) protecting the integrity of the State's political process from frivolous or

fraudulent candidacies. Clements v. Fashing, 102 S.Ct. 2836; 73 L.Ed.2d 508, 517 (1982); American Party of Texas v. White, 415 U.S. 767, 782 (1974); Bullock v. Carter, 405 U.S. 134, 145 (1972); and Jenness v. Fortson, 403 U.S. 431, 432 (1971).

The Circuit Court turned next to the "least drastic" means aspect of the standards. Adopting the language and rationale of this Court in a number of similar cases, the Circuit Court found that the "least drastic" means test posed a very practical, logical test. The Circuit Court first noted that any fixed percentage or number of signatures required would necessarily be arbitrary and probably impossible to defend, in an absolute sense, because any fraction of a percent less or one fewer in number "would not leave the interest of the State unprotected". 710

F.2d at 793-94 It is here that the Circuit Court, as has this Court, turned to the "totality" of the petitioning system involved.

Beginning at page 794, the Circuit Court noted the following aspects of the Florida system which eased the petitioning requirement for minor parties:

1. No restrictions on persons eligible to sign petitions, other than that they be registered voters in the State (which, according to the evidence presented, allowed an unrestricted pool of approximately 4.8 million registered voters who could sign the petition).

2. No party restrictions.

3. No limit on the number of petitions for parties which could be signed by any one registered voter.

4. No restrictions due to any primary election participation.

5. No geographical limitations.

6. No limitation on the number of signatures which would be submitted to satisfy the three percent (3%) requirement.

7. 188 calendar days in 1982 available to solicit and obtain signatures.

8. Petition cards provided free of charge.

9. Random sampling used to test the validity of petition signatures.

10. A nominal charge of ten cents ($.10) for each signature randomly checked.

Lastly, the Circuit Court turned to what is probably the only "litmus" test concerning ballot access petition cases. The Circuit Court felt compelled to consider whether Florida's statutes would act to "freeze the status quo". 710 F.2d at 794. The American Party qualified a slate of candidates in Florida in both 1974 and 1976 under the same statutory

requirements. This conclusively established that Florida law does not freeze the status quo but provides a realistic means of access. This "realistic means of access" as a test in such cases is based upon prouncements of this Court in cases such as Clements v. Fashing, supra (which proposed the test of whether the election laws made it "virtually impossible"), and American Party v. White, supra. See also Williams v. Rhodes, 393 U.S. 23 (1967)(the precursor to all subsequent independent minor party election cases).

The fact that terms such as "reasonableness", and considerations such as the possibility versus the impossibility of obtaining ballot access, appear in cases analyzing ballot access is no evidence of any abandonment or misapprehension of the strict scrutiny test. Rather, it simply

reflects the desire to provide greater certainty in the standards to be applied so that the result reached by the various courts will produce some consistency.

The Circuit Court also properly distinguished between the individual, independent candidacies and the party status which permeates this entire case. The Circuit Court directly applied the teachings of this Court in Storer v. Brown, 415 U.S. 724 (1974). The Court held there that the qualitative difference between an independent candidacy and a party candidacy justifies differences in treatment. This same rationale has been applied by other courts. See Dart v. Brown, 531 F. Supp. 135 (E.D. La. 1982), aff'd 717 F.2d 1491 (5th Cir. 1983); and Hudler v. Austin, 419 F. Supp. 1002 (E.D. Mich. 1976), aff'd sub nom. Allen v. Austin, 430 U.S. 924 (1977). These cases appear dispositive of

the Petitioners' contention that there is no legally supportable reason for the distinction between an independent candidate and his opportunity to collect petition signatures according to the geographic limits of the race involved, versus a minor political party candidacy. As Section 99.096 makes clear, once the Libertarian Party of Florida obtains the three percent (3%) statewide petition, it may run a slate of candidates. See Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375, 1380 (10th Cir. 1982), cert. denied 103 S.Ct. 1892 (1983). For example, if William Marina, the Libertarian's so-called "announced" candidate for commissioner of Education, obtained the three percent (3%) amount (which would also be the same requirement for an independent candidate), any other candidate the Libertarian Party nominated and convinced

to run could also run for statewide elective office.

More importantly, if, during the course of obtaining three percent (3%) for the statewide requirement, the Libertarian Party also obtained three percent (3%) on a local, or district-wide basis, the party could run a slate of candidates within that locality or district. In other words, once the required number of signatures was obtained, the party could run a candidate in each race within that locality or district. This would produce a far greater advantage for the party over an independent candidate, who would be limited to running in the single race for which he or she qualified. As a matter of fact, the single name petition card system provided for in the Florida Statutes promotes the ability to identify the origin of signatures on a local or district wide basis, thereby

facilitating the qualification of a minor party on a local and district basis while simultaneously permitting its qualification on a statewide basis. See Kirk v. Smathers, Case No. TCA 78-815 (N.D. Fla. 1978)(an unreported case validating the single signature card system).

It is highly debatable that the Petitioners even presented a case that was ripe for controversy. Neither the Libertarian Party nor any individual candidate made any effort whatsoever to qualify for office. In other words, neither the Party nor any individual candidate enjoyed the status of a diligent candidate. The decisions of this Court clearly demonstrate the importance of diligence. In Storer v. Brown, supra at page 742, the Court stated that the focal point of inquiry was ". . .could a reasonably diligent candidate be expected to satisfy

the signature requirements. . .?". In cases such as Williams v. Rhodes supra, and Anderson v. Celebrezze, 103 S.Ct. 1564 (1983), the record clearly reflected that the party or the candidate involved had satisfied the substantive requirements of the ballot access system being challenged.

Anderson v. Celebrezze points out another critical distinction here. With the dismissal of Ed Clark as a proper party plaintiff, no party plaintiff represents any election interest outside of intrastate concerns. The Petitioner Libertarian Party of Florida is an organization limited to the State of Florida. The remaining individual Petitioners except Doug Ramsay "announced" to run for intrastate offices in Florida. The Anderson case strongly suggests that presidential election cases must be more strictly scrutinized than cases involving intrastate considerations

because of the impact of presidential cases on a national scale.

The Petitioners' insistence on comparing the Florida system of ballot access for minor parties with that of other states has little persuasive effect. The Circuit Court rejected such comparisons, noting at page 794 that the federal courts should not impose legislative judgments of other states on a sister state. The Petitioners have continually asked that the federal judiciary intervene in legislative matters properly vested in the Florida Legislature without any showing that they have been diligent in their efforts to satisfy its requirements and, more importantly, without showing any evidence or argument which would invalidate the Florida system.

QUESTION II.

THE PETITIONERS HAVE FAILED TO PRESENT TO THIS COURT ANY CONFLICT WITH DECISIONS OF THIS COURT OR DECISIONS OF ANY OTHER CIRCUIT COURT OF APPEALS.

Rule 17 of the Rules of this Court sets forth considerations governing review on certiorari. Rule 17.1(a) indicates that one significant consideration will be whether the decision sought to be reviewed conflicts with another decision of a federal court of appeals or a state court of last resort. (The question of whether the Circuit Court has departed from the accepted and usual course of judicial proceedings has been argued under Question I.)

The Circuit Court has very clearly followed the precedents established by this Court and has ruled consistently with all other courts of appeals which have considered these issues. The Eleventh

Circuit now joins the Fifth and Tenth Circuits in ruling that state ballot access systems are valid against contentions by state Libertarian Parties' contentions that their right to vote and associate are impacted without any overriding state interest and that independent candidates are discriminatorily favored over minor parties. Dart v. Brown, supra; and Arutunoff v. Oklahoma State Election Bd., supra.

The Petitioners have cited only one circuit court opinion in their Petition, McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980). The percentage required under the North Dakota statutes, being reviewed in McLain, exceeded that of Florida's (3.3 percent versus 3 percent). That opinion was based on the "totality" of the ballot access requirements. The Eighth Circuit concluded that the early filing deadline

was a more significant factor than the percentage required. Id. at 1164&1167. That Court was also greatly troubled by the lack of success of minor parties. Id. at 1165. McLain has been distinguished in the Dart decision. 717 F.2d at 1500.

The Florida petition ballot access system has already been reviewed and upheld several times by the federal judiciary. In Beller v. Kirk, 328 F. Supp. 485 (S.D. Fla. 1970), aff'd sub nom. Beller v. Askew, 403 U.S. 925 (1971), the New Party challenged Florida's petitioning system. The district Court rejected challenges claiming invidious discrimination against minor parties. See also MacBride v. Askew, 541 F.2d 465 (5th Cir. 1976). The federal judiciary has also reacted favorably to certain specific aspects of the Florida petitioning system, such as the single signature card system, among others.

Wilson v. Firestone, Case No. TCA 80-880 (N.D. Fla. 1980), aff'd 623 F.2d 345 (5th Cir. 1980); and Kirk v. Smathers, supra.

It is quite clear that the Circuit Court was eminently correct in observing that it was "applying what appears to be rather settled law". Each appropriate court in the federal judiciary has had an opportunity to consider challenges to the Florida petitioning ballot access system, without success at any level. Further, there is clearly no conflict between the Eleventh Circuit's opinion and the opinion of any of its sister courts. The Eleventh Circuit has applied the previous rulings of the United States Supreme Court unerringly.

The Petitioners in fact ask this Court to overrule its previous decisions. No clearer voice could be heard to oppose this result than the Eleventh Circuit. The Circuit Court, applying the principles

expressed in Storer v. Brown, supra, observed that there were recognized differences between a party candidate and an independent candidate. Applying the same case, the Court correctly concluded that federal courts are not free to impose legislative judgments concerning the election process of any state. The Petitioners ask this Court to overturn an entire ballot access system, surviving still after challenges going back at least 12 years, for the sole purpose of permitting an "announced" candidate of the Libertarian Party of Florida to run without showing any modicum of support and to be able to have himself advertised as a member of the Libertarian Party of Florida even though he might be the only candidate of the Party in the entire State. This Court has not been willing to so demean the

concept of a political party and should not be willing to do so now.

CONCLUSION

For the foregoing reasons, the Respondents State of Florida, George Firestone, Betty Carter and Jane Carroll respectfully request this Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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